89-1169

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No. _____

IN THE

Supreme Court of the United States

February Term, 1990

MARGARET B. COMORA, EMANUEL M. COMORA, and MARGARET B. COMORA and EMANUEL M. COMORA as Trustees of the COMORA FAMILY TRUST,

Petitioners,

v.

IRVIN RADELL, NANCY RADELL, DAVID RADELL, and DAVID and MARY RADELL, as Trustees of the DAVID AND MARY RADELL FAMILY TRUST,

Respondents.

Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District, Division One

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QUESTIONS PRESENTED

1. Whether the safeguards established by California law to regulate awards of punitive damages guarantee fundamental fairness under the Due Process Clause of the Fourteenth Amendment

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Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION ONE

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Respondents respectfully urge this Court to deny the petition for a writ of certiorari to review the judgment and opinion of the California Court of Appeal for the Second Appellate District, Division One, entered in this proceeding on June 28, 1989

OPINION BELOW

The opinion of the California Court of Appeal for the Second Appellate District, Division One, is unreported and is reprinted in the Appendix to the petition. See App. 71-70.

JURISDICTION

The judgment and opinion of the Court of Appeal was filed on June 28, 1989. On September 21, 1989, the California Supreme Court denied petitioners' timely petition for review of the Court of Appeal decision.

After Justice O'Conner granted an extension of time within which to file a petition for a writ of certiorari, petitioners served their petition on January 23, 1990.

The jurisdiction of this Court to review the judgment of the California Court of Appeal is invoked under 28 U.S.C. § 1257(a)

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, § 1, U.S. Constitution:

. . .[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . .

STATUTES INVOLVED

The relevant statutory provisions are set forth in the petition at page 3.

STATEMENT OF THE CASE

This case involved the fraudulent efforts by petitioners to tortiously repudiate a 15 year-old written partnership agreement, though the use of forged documents, false accountings and deliberate lies.

An accurate summary of the facts and proceedings can be found in the Opinion of the Court of Appeal. App. 1-70.

On the issue of punitive damages, however, several important facts have been ignored or misstated in the petition.

1. The case went to the jury on two separate causes of action seeking punitive damages: Fraud and tortious repudiation of the partnership agreement. On appeal, petitioners never challenged the sufficiency of the evidence to support the fraud verdict, nor did they assert that the jury's finding of fraud violated petitioners' rights under the Fourteenth Amendment.

2. The jury made a series of findings, based on a clear and convincing standard of proof, that petitioners' Exhibit 534 (their version of the December 20, 1970 Property Agreement) was not genuine; that petitioners' Exhibit 588 (a purported "Quitclaim Deed") was not genuine; that petitioners' Exhibit 589 (a purported "Reconveyance Deed") was not genuine and that petitioners were guilty of "fraud," "malice" and "oppression," as defined by the

trial court. (CT 3942-3948). Those findings are now final and are not challenged in this Court.

3. The trial court issued a twenty (20) page Statement of Decision on the equitable issues in the case. (CT 4833). Applying a clear and convincing standard of proof, the trial court found, among other things, that petitioners "EMANUEL M. COMORA and MARGARET B. COMORA each willfully testified falsely on material points and that from all the evidence, the probability of truth does not favor their testimony in other particulars." (CT 4835).

4. Petitioners assert that California law fails "to place any limits on the discretion of a civil jury in this type of case to impose punitive damages in whatever amount the jury thinks best." Petition, p.14. This is quite false, as demonstrated by the record in this very case. California Code of Civil Procedure, § 657(5) provides that a verdict may be vacated and a new trial granted, on application of the party aggrieved, on the grounds of "Excessive

. . . damages." In denying petitioners' motion for new trial on the grounds, among others, of excessive punitive damages, the trial court observed: "I would like to state that I don't believe that I have ever seen a case where it was more overwhelming to sustain the jury's verdict." (RT 4217: 13-16).

5. Petitioners ruefully argue that the "jury was never informed of their net worth and therefore could not make even a rough calculation of the size of a penalty sufficient to deter their wrongful conduct in the future." Petition, p. 14. What petitioners have left out, which the Court of Appeal detected (App. 53), is that it was respondents who tried to obtain evidence of petitioners' net worth and financial condition and it was petitioners who blocked the admission of that information. (RT 1801-1803; 3612-3614). Furthermore, as the Court of Appeal also pointed out, there was other evidence of petitioners' wealth, including their 50% interest in the apartment building in

question, which had a fair market value of at least $2,000,000, together with the income flow and other assets held by petitioners. (App. 57-58).

6. Petitioners also state that they had no warning that their conduct would expose them to punitive damages. (Petition, p. 15). This too is highly insincere. Emanuel Comora is certainly no newcomer to civil litigation. See, Comora v. Comprehensive Care Corp. (1983) 140 Cal.App.3d 369, 376-378 ("'Comora's continued abuse of our limited and overburdened judicial processes to thwart the doing of justice must cease'"). In particular, petitioners were no strangers to the risk of punitive damages under California law. The record reflects that in Convalescent Hospital Association Corp. and Barbara Olsan v. Emanuel Comora, 2d Civil 43183 (Feb. 26, 1975), a judgment was entered against Comora for $152,886.46 in compensatory damages and $230,00.00 in punitive damages. (CT 3327-3357).

The judgment was affirmed on appeal. See, Olsan v. Comora (1977) 73 Cal.App.3d 642, 644.

7. The award of $1,250,000 in punitive damages in this case was not excessive in light of the total value of respondents' recovery. The jury awarded respondents $249,224.57 in compensatory damages. The trial court awarded $225,701.52 in attorneys fees. Based on the jury's advisory verdict, the trial court also upheld respondents' 50% interest in the building in question. That interest was valued at $2,000,000 and was the target of petitioners' forged documents. The trial court also awarded $603,681.41 on Nancy Radell's disputed deed of trust and $309,989.08 on David Radell's disputed deed of trust. All told, the total value of respondents' recovery, aside from punitive damages, was $3,388,396.50. Therefore, the punitive damage award represented only slightly more than one-third of that sum.

REASONS FOR DENYING THIS WRIT

I

CALIFORNIA LAW PROVIDES AMPLE SAFEGUARDS TO ENSURE THAT AWARDS OF PUNITIVE DAMAGES AFFORD FUNDAMENTAL FAIRNESS AND GUARANTEE DUE PROCESS

Petitioners do not contend that the Due Process Clause of the Fourteenth Amendment prohibits all awards of punitive damages. Petition, p. 18. Instead, petitioners argue that the Due Process Clause requires the "articulation of some standard or standards by which punitive damages may be measured and against which any particular award may be reviewed." Petition, p. 18. Petitioners contend that under California law, as applied to the particular facts of this case, the punitive damage award violated their Fourteenth Amendment rights.

The Fourteenth Amendment prohibits a state from depriving any person of property without due process of law. Due process

requires the government to provide fundamentally fair proceedings, but it "'is not a technical conception with a fixed content unrelated to ... circumstances.' [Citation.]" Lassiter v. Department of Social Services (1981) 452 U.S. 18, 24. To be fundamentally fair, the proceeding must guarantee each party "the opportunity to present his case and have its merits fairly judged." Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 433.

In determining whether California's procedures afford a party "fundamental fairness," the courts examine (1) the private interest affected by the action, (2) the risk of an erroneous deprivation of that interest through the procedure presently used, (3) the probable value of additional safeguards and (4) the government's interest, including the function involved. Mathews v. Eldridge (1976) 424 U.S. 319, 335.

It is, of course, a defendant's property interest which is affected by a determination of

whether and in what amount he or she should be liable for punitive damages.

By statute and court decisions, California has designed a fair system for the imposition of punitive damages, which accommodates the legal and constitutional rights of defendants to due process, against the legal and constitutional rights of plaintiffs to effectively redress civil wrongs and of society to discourage like conduct in the future. Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910[1].

The primary tenet of the common law on this subject addresses the very purpose of punitive damages. Such damages are intended to punish certain defined classes of civil wrongdoers and deter the commission of similar wrongful acts. Consequently, the appropriate amount of punitive damages is that sum which is

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[1]/ Rooted in English common law, the doctrine of punitive damages has been part of California's common law long before its Civil Code was adopted, Wilson v. Middleton (1852) 2 Cal. 54, and was codified as Civil Code § 3294 in 1872. Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 807.

necessary "to ensure that the defendant does not repeat his act and that others do not follow his example. [Citation.]" Downey Savings & Loan Assn. v. Ohio Casualty Insurance Co. (1987) 189 Cal.App.3d 1072, petn. for writ of cert. den. sub nom. Ohio Casualty Insurance Co. v. Downey Savings & Loan Assn. (1988) __ U.S. __, 108 S.Ct. 2023.

The courts are guided "by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. [Citations,] Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionately high amount of punitive damages

if the actual harm suffered thereby is small. [Citation.] Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." Neal v. Farmers Ins. Exchange, supra 21 Cal.3d 910, 928.

Although this Court could not tell it from the petition, California law provides four (4) separate safeguards during the course of civil litigation by which the courts regulate the imposition of punitive damages. These procedures guarantee fundamental fairness.

First, after the presentation of all of the evidence, a defendant may move for a directed verdict on the issue of punitive

damages. Code of Civil Procedure § 630. This gives the court an opportunity to withhold that issue from the jury, where there is no evidence of sufficient substantiality to support an award of punitive damages. Van Horn v. Southern Pacific Co. (1956) 141 Cal.2d 528.

Second, the jury is given a detailed instruction regarding the recovery and measure of punitive damages. BAJI 14.71. Initially, the jury must find that the defendant is guilty of "oppression, fraud or malice." Each of these terms is specifically defined in the jury instruction and has a well-established meaning which has withstood occasional challenges as being unconstitutionally vague. Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 811; Fletcher v. Western National Ins. Co. (1970) 10 Cal.App.3d 376, 404-405. Next, the jury is advised that the amount of punitive damages is left to their "sound discretion" which must be "exercised without passion or prejudice." Finally, the jury is instructed to consider

three factors in arriving at an award of punitive damages:

> "(1) The reprehensibility of the conduct of the defendant,
>
> (2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,
>
> (3) That the punitive damages must bear a reasonable relation to the actual damages."

Third, a defendant against whom a jury has awarded punitive damages, may move for a new trial on the grounds of "excessive . . . damages." Code of Civil Procedure, § 657(5). The judge who presided over the trial is empowered to vacate the award of punitive damages if "after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the . . . jury clearly should have reached a different verdict. . . ." California law has

long held that this is an opportunity for the court to set aside excessive damages "given under the influence of passion or prejudice." Lee v. Southern Pacific Co. (1894) 101 Cal. 118. Consistent with a defendant's due process rights, a motion for new trial gives the court "the prerogative to independently determine the reprehensibility of defendants' conduct in a particular case and may consider the amount of compensatory damages in assessing the degree of reprehensibility." Delos v. Farmers Insurance Group (1979) 93 Cal.App.3d 642, 666.

Fourth, the California appellate courts will scrutinize an award of punitive damages and will not hesitate to reverse where it is excessive or the result of passion or prejudice. Zhadan v. Downtown L.A. Motors (1976) 66 Cal.App.3d 481, 500; Cunningham v. Simpson (1969) 1 Cal.3d 301, 308. California's courts have long understood and conscientiously discharged this duty by setting aside improper punitive damages awards.

Rosenberg v. J.C. Penney Co. (1939) 30 Cal.App.2d 609, 628.

Under California law, the combined impact of these four (4) safeguards insures that awards of punitive damages will be "situated within a range of penalties as to which responsible officials had deliberated and then agreed." Browning-Ferris Industries, Inc. v. Kelco Disposal Inc. __ U.S. __ (1989), 109 S.Ct. 2909, 2923 (J. Brennan concurring).

Given the fact that in California a "body of law specifically defines when exemplary damages may be awarded and how the amount shall be determined," Bertero v. National General Corp. (1974) 13 Cal.3d 43, 66, n. 13. California's punitive damages statute has been held constitutional by its courts on numerous occasions. Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co., supra. 189 Cal.App.3d 1072, 1100-1101, cert. denied sub nom. Ohio Casualty Ins. Co. v. Downey Savings & Loan Assn. (1988)

__ U.S. __, 108 S.Ct. 2023; Grimshaw v. Ford Motor Co. supra, 119 Cal.App.3d 757, 811; Egan v. Mutual of Omaha Ins. Co., (1979) 24 Cal.3d 809, 819; Wetherbee v. United Ins. Co. of America (1971) 18 Cal.App.3d 266, 272; Fletcher v. Western National Life Ins. Co., supra., 10 Cal.App.3d 376, 404-405; Toole v. Richardson-Merrell Inc. (1967) 251 Cal.App.2d 689, 716-717.

Given the innumerable combinations of circumstances which may come into play where punitive damages are sought, these standards cannot in all practicality be more narrowly articulated; hence, it is difficult to perceive with any probability that additional procedures would have value and, indeed, petitioners have not suggested any new safeguards whatsoever.

Finally, the government has a clear policy interest in punishing and deterring peculiarly reprehensible forms of civil wrongdoing, particularly where -as here- a fiduciary relationship exists. With fiduciary trust must go responsibility consonant with that

trust. Egan v. Mutual of Omaha Ins. Co. supra., 24 Cal.3d 809, 820.

CONCLUSION

This case raises no issues more suitable for review than in Combined Ins. Co. of America v. Ainsworth, No. 89-282 or Clardy v. Sanders, No. 89-440, in which certiorari was denied.

Indeed, the corrupt, oppressive and fraudulent conduct established in this case serves to remind us why punitive damages, awarded under articulated standards and pursuant to adequate safeguards, legitimately exist in our civil law as a means of redressing egregious wrongdoing.

Whatever this Court may conclude about other awards of punitive damages from other states, respondents respectfully submit that this award, from this state raises no constitutional issue under the Fourteenth

/ / /

Amendment justifying a writ of certiorari.

Accordingly, the petition should be denied.

Dated: February 21, 1990

Respectfully submitted,

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